



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In the application of:	)	
Gary Chodes	)	
	)	
Serial No.: 09/910,859	)	Group Art Unit: 3628
	)	
Filed: July 24, 2001	)	Examiner: Harbeck, T.
	)	
For: Method and System for Affluent	)	
Retiree Advance	)	

DECLARATION UNDER 37 CFR 1.131

Assistant Commissioner for Patents  
Washington, D.C. 20231

Sir:

GARY CHODES declares that:

1. I am the sole inventor of and am familiar with the subject matter set out in U.S. Application Serial No. 09/910,859, filed at the U.S. Patent and Trademark Office on July 24, 2001 (the "859 application").

2. I am familiar with the Official Office Action dated February 14, 2006 issued therein and the sole reference cited in the Official Action, namely, U.S. Patent No. 6,625,582, granted to Richman et al. ("Richman") with an effective filing date of March 12, 1999.

3. At the time the invention was made, I was the CEO and founder of Viaticus, Inc. ("Viaticus").

4. I had possession of the whole invention claimed in the above-identified '859 application before the filing date of the Richman patent (March 12, 1999).

5. Exhibit A in support of this declaration is attached hereto. Exhibit A is a

memorandum ("3/2/99 memo") to Gary Chodes from attorneys at Mayer, Brown & Platt. The memorandum is an assessment of key legal issues arising in connection with a plan to offer loans to an individual, the principal and interest of which would be paid from the individual's future Social Security payments (see 3/2/99 memo, page 1). The 3/2/99 memo also addresses key legal issues arising in connection with directing the received benefits to a participant account (Option 1, see 3/2/99 memo, page 1). The 3/2/99 memo also addresses the transfer of the received benefits from the participant account to a second account (see 3/2/99 memo, page 3).

6. The 3/2/99 memorandum was generated at my request to address questions that arose as a result of conceiving the invention set out in the '859 application.

7. Since the date of the 3/2/99 memo is March 2, 1999, the 3/2/99 memo, and the subject matter contained therein, clearly predates the Richman filing date of 3/12/99.

8. Exhibit B in support of this declaration is attached hereto. Exhibit B is a memorandum ("3/11/99 memo") to Viaticus from Milliman & Robertson, Inc. The memorandum is a report discussing various computation and analysis of a covered worker's Social Security benefits.

9. The 3/11/99 memorandum was generated at my request to address questions that arose as a result of conceiving the invention set out in the '859 application.

10. Since the date of the 3/11/99 memo is March 11, 1999, the 3/11/99 memo, and the subject matter contained therein, clearly predates the Richman filing date of 3/12/99.

11. At least Claim 1 of the '859 application requires determining a value for the lump sum, i.e., the loan amount. This aspect of the claim is addressed in at least the 3/11/99 memo.

12. At least Claim 1 of the '859 application requires paying the sum to the

participant. This aspect of the claim is addressed in at least the 3/2/99 memo.

13. At least Claim 1 of the '859 application requires directing the received benefits to a participant account. This aspect of the claim is addressed in at least the 3/2/99 memo.

14. At least Claim 1 of the '859 application requires periodically transferring the received benefits from the participant account to a second account. This aspect of the claim is addressed in at least the 3/2/99 memo.

15. So clearly, Exhibits A and B demonstrate that I had possession of the whole invention claimed in the above-identified '859 application before the filing date of the Richman patent, (March 12, 1999).

16. I hereby declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 19 of the United States code and that such willful false statements may jeopardize the validity of the application or any patent issued thereon.

Respectfully submitted,

July 20, 2006  
Date

Gary Chodes  
Gary Chodes

MAYER, BROWN & PLATT

**ATTORNEY WORK PRODUCT**  
**PRIVILEGED AND CONFIDENTIAL**

**MEMORANDUM**

March 2, 1999

**MEMORANDUM TO:** Gary Chodes  
(Viaticus, Inc.)

**RE:** Social Security Project

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You have asked us to prepare a preliminary assessment of the key legal issues arising in connection with your proposal under which Viaticus, Inc. ("Viaticus"), a wholly-owned subsidiary of CNA Insurance, Co ("CNA"), would make loans, the principal and interest of which would be paid from debtors' future Social Security payments.

1. Description of Proposed Transaction.

Under the proposed transaction (the "Plan"), Viaticus would make a loan to a high net-worth individual. The loan would not require any repayment by the debtor and would be non-recourse to the debtor except under certain circumstances (described below). In exchange, the debtor would arrange to have his or her Social Security payments directly deposited into a specified account (either at a bank ("Option 1") or at Viaticus ("Option 2")) and would covenant not to change his or her direct deposit instructions, not to commingle funds in that account and not to withdraw funds from that account. The Social Security payments once received under Option 1 or Option 2 would go to Viaticus as repayment of principal and interest on the loan. If the debtor were to change deposit directions (called "diversion risk") or to breach any of his or her other covenants, Viaticus could accelerate the loan and would have recourse against all of the debtor's assets, but not against the debtor's Social Security payments. To avoid regulatory problems and adverse publicity, Viaticus might choose not to pursue its remedies against debtors who were left with few assets other than Social Security payments.

2. Prohibition on Assignment of Social Security Payments.

Title 42 U.S.C. §407<sup>1/</sup> limits the transfer and assignability of the right to receive Social Security payments. The purpose of Section 407 is to protect the benefits paid to a recipient from claims of creditors.<sup>2/</sup> Because of Section 407, these payments are exempt from state garnishment, attachment or levy procedures as well as from the freezing by creditors of bank accounts that contain Social Security payments.<sup>3/</sup> In some cases, these payments are exempt from bankruptcy proceedings, and the status of such funds as Social Security funds does not diminish once such funds have been deposited into a debtor's bank account, regardless of whether such funds have been commingled with other funds.<sup>4/</sup>

This general prohibition and the courts' interpretation of this prohibition are consistent with the general legislative intent of Congress in its enactment of the relevant provisions of the Social Security Act.<sup>5/</sup> Congress intended that the payments, commonly

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<sup>1/</sup> Title 42 U.S.C. §407 states in relevant part:

The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

<sup>2/</sup> See e.g., Michigan Dep't of Social Services, 285 N.W. 2d 427.

<sup>3/</sup> See, Harris v. Bailey, 574 F. Supp. 966 (WD Va., 1983), for very general discussion of the ability of a creditor to freeze a bank account containing Social Security payments. See also, NCNB Financial Services, Inc. V. Shumate, 829 F. Supp. 178 (4th Cir. 1994) (these prohibitions apply even if the funds in an account have commingled with non-Social Security funds, provided such funds can be traced). See also, Dionne V. Bouley, 583 F. Supp. 307 (DC RI., 1984) modified on other grounds, 757 F.2d 1344, for general discussion on garnishment.

<sup>4/</sup> See, In re: Eunice Lazin, 217 B.R. 332 (Bankr. M.D.FL., 1998) (" . . . this Court must ascertain whether the debtor has the necessary resources for continuing basic care and maintenance without the accumulated Social Security benefits"). See also, In Re: Carol K. Crandall, 200 B.R. 243 (Bankr. M.D.FL., 1995) (exempted only half of the debtor's accumulated Social Security funds located in a bank account, because this amount was all she would need to meet her basic maintenance expenses).

<sup>5/</sup> See, Senate Report No. 628 Calendar No. 661, May 13, 1935 (for full legislative history of the original enactment of these payments).

referred to as old age assistance, were to provide a universal remedy for "the principal causes of insecurity in our economic life" and to provide "security for those aged people without an adequate means of support."<sup>6/</sup> The Social Security Act has undergone a series of amendments since the 1935 amendments referenced herein, including the expansion of eligibility to all individuals who meet the requisite age criteria without regard to any need criteria.

3. Technical Issues with Respect to Taking a  
Security Interest in Social Security Payments

Viaticus could consider a number of alternatives to make the Plan's collection process more secure as against the debtor or other creditors of the debtor (in the case of the bankruptcy of the debtor, for instance). For one, under the Uniform Commercial Code as in effect in a few states, Viaticus could perfect its security interest in the account set up to hold Social Security payments.<sup>7/</sup> This would have the benefit of protecting Viaticus against other creditors of the debtor in bankruptcy. Alternatively, Viaticus might wish to require that all payments be directed to a lock-box account or to an account held jointly by the debtor and Viaticus. All of these methods could make the payments more secure to Viaticus, but would probably not be enforceable because they could be viewed as an "attachment" in violation of Section 407. The lock-box proposal has the additional problem that it might attract the attention of the government because a number of Social Security payments presumably would be directed to the same account. These methods may also run the risk that a court could hold that the entire Plan is in violation of Section 407, making the contract between Viaticus and the debtor illegal and void.

It may be safer to avoid the appearance of a security interest, attachment or assignment in Social Security payments. Under this variation of the Plan, under either Option 1 or Option 2, a debtor could be required to direct Social Security payments into an account controlled by the debtor and to give standing directions to permit Viaticus to sweep such account. This method would greatly increase the risk to Viaticus that a debtor could divert the payment stream by making withdrawals or changing his direction to allow Viaticus to sweep the account. On the other hand, the debtor could covenant under the Plan, among other things, not to redirect or withdraw such amounts and not to change his instructions to sweep such amounts to Viaticus. Any breach of these covenants would cause the acceleration of the loan and would provide recourse against the debtor's other assets to repay the loan. In an attempt to make the account appear even more under the control of the debtor, and therefore not an attachment of Social Security payments, the

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<sup>6/</sup> Id., pp. 2 and 4.

<sup>7/</sup> Taking such a security interest in the account will be permitted in more states as they adopt the revised Article 9 of the Uniform Commercial Code.

EXHIBIT B



**VIATICUS, INC.**

**PRELIMINARY REPORT  
ON  
ADVANCE LOAN PROGRAM**

March 11, 1999

MILLIMAN & ROBERTSON, INC.

**VIATICUS, INC.**

**PRELIMINARY REPORT**

**Background**

The purpose of this Preliminary Report is to provide Viaticus, Inc. with up-to-date information on the amount of Social Security benefits available in 1999 to maximum wage earners between the ages of 70 and 74 under certain assumptions. The report also provides a broad perspective on the current outlook for Social Security reform, particularly as it might affect high net worth individuals between ages 70-74.

**Maximum Benefits**

This letter provides computations of the maximum individual benefit payable under the Social Security System for individuals born from 1925 through 1929.

The computation of a covered worker's Social Security benefit is a complex matter involving many different steps. The first step is to compute the Primary Insurance Amount ("PIA"), which is the benefit payable to a single worker without dependents, depending primarily on the level of earnings from work. The actual benefit is then based on when the worker retires, the cost of living adjustments since the worker's retirement, marital status and other factors not likely to be relevant for high net worth individuals. If a worker retires before Social Security retirement age, the benefit is reduced. If the worker retires after Social Security age, the benefit is increased. Once a worker has retired, the benefit increases in accordance with the cost of living formula used by Social Security.

Maximum individual annual retirement benefits payable under the U.S. Social Security system during 1999 for various individuals are as follows. (Please note that these benefits are for the worker only and do not include additional benefits payable to the spouse. As we discussed, a spouse (same age) is entitled to at least one-half of the worker's benefits as shown in this table.)

	Year of Birth				
	1925	1926	1927	1928	1929
Retirement @ 65	\$15,164	\$15,119	\$15,493	\$15,596	\$15,454
Retirement @ 70	\$19,308	\$19,164	\$19,980	\$20,028	\$20,208



Amounts were determined according to the following steps:

- 1) Determination of the worker's PIA payable at normal retirement age for the individual, assuming that compensation for all years of employment exceeded the taxable wage base;
- 2) Increase of the PIA for Cost-of-Living Adjustments (COLAs) under the Social Security system for each year since retirement; and
- 3) For retirement after age 65, increase of the benefit to reflect the delayed retirement credit (3.5% per year of delay for workers born in 1925 and 1926; 4.0% per year for workers born in 1927 and 1928; and 4.5% per year for the worker born in 1929).

### **Earnings Restrictions and Taxation of Benefits**

Once a worker has reached age 70, there is no reduction in the Social Security benefit for any level of outside earnings. However, the benefits of high net worth individuals will in all likelihood be subject to tax. The amount of benefit included in income is based on a complex formula. The formula compares the taxpayer's combined income with certain thresholds and then determines the taxable benefit based on the application of a formula. Combined income is defined as one-half Social Security benefits plus other income including tax-exempt income and income from foreign sources.

The maximum amount of Social Security benefits that must be included in income is 85%, which we would expect to be the case for most of the target market. The higher threshold formula for determining the amount of Social Security benefit includible in income in 1999 is:

- 1) For single individuals whose combined income (1/2 Social Security Benefits + other income including tax-exempt income) exceeds \$34,000, the includible Social Security benefit is the lesser of: a) 85% of the Social Security benefits; or b) 85% of the difference between their combined income and \$25,000 plus the lesser of: one-half of their Social Security benefits or \$4,500. For example, if a single individual has total income of \$44,000 and is receiving \$18,000 per year in Social Security benefits the amount taxable would be \$13,000 ( $.85 \times (\$44,000 - \$34,000) + \text{the lesser of } \$4,500 \text{ or } .5 \times \$18,000 = \$8,500 + \$4,500$ )
- 2) For married workers, the formula is the same except that the cutoff is \$44,000.

### **Legislative Initiatives**

Legislation to change the Social Security system abounds in Congress and many other proposals are expected. Thus far, however, all of the reform ideas that have been publicly aired and that have widespread interest can be said to fall into three general categories. One – stock market investment of some of money in the Social Security trust fund – is advocated principally by the White House

and to a lesser extent by state officials. The second – establishment of personal accounts – has significant bipartisan support but there is no consensus on the method of implementation or the manner in which they would operate. The third – maintain the system as is but adopt several “fixes” – is generally popular with a large segment of the public, particularly current Social Security beneficiaries and those approaching retirement (i.e., those whose benefits would be protected by the vast majority of reform efforts, which generally call for preserving current law benefits for those aged 55 – and sometimes 50 – and older).

Reform that ultimately falls into either or both of the first two categories should have no impact on the target market. In the third category, the only type of reform proposals being considered that could affect individuals in the target market are those that would reduce the cost-of-living increase. Proponents of lowering the COLAs firmly believe that the Consumer Price Index used to calculate the annual adjustments to Social Security benefits overstate the rate of inflation either in general or specifically for the retired population. Proposals thus have called for a downward adjustment in the range of 0.5% to 3.5%. Others may try to limit the COLA to the maximum dollar amount payable to Social Security recipients that receive the average or lower Social Security benefit.

The reform proposals (thus far) to invest Social Security trust funds in the stock market make no changes to the current system (nor would proposals that would simply increase the current payroll taxes to maintain the current system) and, therefore, high-net-worth individuals should experience no disruptions by such a change. The reforms that would lower – by about one-half – the benefits payable from Social Security and replace the lost amounts by individual accounts would affect only the Social Security benefits of individuals under age 60.

Until additional details about the reforms become known, it is difficult to determine their full future implications for high-net-worth individuals under age 60. Changing other factors used to compute benefits could have implications for future maximum-wage earners, but the degree to which they will be affected will depend in large measure on the extent of the proposed changes. Since the early discussions of addressing Social Security trust fund solvency, for example, one of the two most prevalent, targeted revisions is to raise the “normal retirement age”(NRA). The current NRA, 65, already is scheduled to increase gradually until it reaches 67 in 2027 (i.e., for those born in 1960 or later). Individuals may now retire as early as age 62 with an actuarially reduced benefit, or later with an actuarially increased benefit. Proponents of this fix assert that the NRA should be phased in faster or raised even higher because people are living longer and/or people should be “encouraged” to remain in the active workforce for a longer period. Proposals thus have called for a complete phase in to age 67 faster or an increase in the NRA to age 70. Some proposals also would accordingly adjust upwards the age-62 eligibility for actuarially reduced benefits.

Although none of the proposals making “minor” changes to Social Security specifically adjust the number of years an individual must contribute to the Social Security system or alter the “primary insurance amount” (PIA) that is used in the benefits computational formula, both items could easily be raised when Congress acts on such measures or other reform plans. Congress also can be expected to consider other adjustments that affect the amount of contributions individuals make to the system or the amount that Social Security pays out to individuals, such as: increasing the

maximum taxable earnings level; including some nonwage compensation as covered earnings; increasing the number of years of earnings included in the computation period; modifying the "average wage index" used to calculate an individual's PIA; and limiting benefits to those with lower incomes ("means testing"). One area that has caught the attention of members of Congress and thus deserve close monitoring is the issue of inadequacies in the Social Security system as it relates to women.

### **Conclusion**

The only existing proposals that would have an immediate impact on the target market are those that would reduce the cost-of-living adjustment. With the passage of time, new proposals may surface that directly impact the target market or indirectly do so, due to a change in the tax structure, for example. We will periodically update you if and when any such proposals surface.